



CITY OF West Linn

Memorandum

Date: October 1, 2020

To: West Linn City Council

From: Jennifer Arnold, Associate Planner

Subject: AP-20-03- Appeal of the Planning Commission's approval of MISC-20-04 - Two Year Extension to Previously Approved 34-Lot Subdivision (SUB-15-03/AP17/01)

On September 29, 2020 Staff received written testimony from Dorianne and Doug Palmer expressing concerns regarding negative impacts on the surrounding neighborhoods and the expiration of the previous land use decision. This testimony was received after the publication of the Staff Report.

On October 2, 2020 Staff received testimony from the Applicant's representative Michael Robinson.

From: [Jude Palmer](#)
To: [Arnold, Jennifer](#); [City Council](#)
Subject: 18000 Upper Midhill
Date: Tuesday, September 29, 2020 12:11:29 PM

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City Council,

We are writing to request a denial of the two-year extension of the development at 18000 Upper Midhill Drive.

The application for this development has expired. The developer had three years to fulfill the requirements to proceed, but did not.

As you know, this development, as it stands, will have numerous lasting negative impacts on the surrounding neighborhoods. The developer's traffic study was deeply flawed. The traffic study the Harra's had done refuted the developer's study entirely. I ask you all to please take the time to review the Harra's study.

Now that the application has expired, City Council has the opportunity to deny the extension so that the process can start over, and development can be done responsibly.

We thank you for your consideration.

Dorianne and Doug Palmer

October 2, 2020

Michael C. Robinson

Admitted in Oregon
T: 503-796-3756
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mrobinson@schwabe.com

VIA E-MAIL

Mr. Russ B. Axelrod, Mayor
City of West Linn City Council
West Linn City Hall
22500 Salamo Road
West Linn, OR 97068

RE: Appeal of West Linn File No. MISC 20-04; Letter Supporting the West Linn Planning Commission's (the "Planning Commission") Approval of a Two-Year Extension of the Chene Blanc Subdivision 2017 Decision

Dear Mayor Axelrod:

This office represents the Applicant, Upper Midhill Estates, LLC. This letter is the Applicant's written response to the appeal (the "Appeal") filed by Jason and Jessica Harra (the "Appellants") of the Planning Commission's decision approving the Application (the "Application") for a two-year extension of the Chene Blanc Subdivision (the "Subdivision") 2017 approval (City of West Linn File No. SUB-15-03/ WAP-16-03/AP-17-01) (the "2017 Decision"). The Chene Blanc Subdivision is a 34-lot single-family detached dwelling subdivision located at 18000 Upper Midhill Drive). The Planning Commission approved the Application, which extends the 2017 Decision for two years pursuant to West Linn Community Development Code (the "CDC") 99.325(A).

The Applicant agrees with the Staff Report to the City Council.

This letter is submitted prior to the City Council's hearing on the Appeal on October 5, 2020.

I. Introduction

The Application and the Planning Commission's approval are identical to the 2017 Decision. The only change to the Subdivision is the movement of the curb line in front of certain lots to allow for additional on-street parking and converting the original planter strips to parking spaces, resulting in at least five additional on-street parking spaces. The City Engineer requested the change and the Applicant is pleased to make the change even though the change is not a result of a change to the CDC.

Kittelson & Associates conducted a complete Transportation Impact Analysis ("TIA") for the 2017 Decision and found that the surrounding transportation system was adequate to serve

the Project. Kittelson submitted a supplemental TIA in March, 2017.¹ The TIA specifically examined the projected trip growth from proposed duplexes on Willamette Drive and the expansion of the Mary's Woods development. As explained below, the conclusions in the TIA were carefully considered by the City Council in approving the 2017 Decision and the Oregon Land Use Board of Appeals ("LUBA") in affirming the City Council's 2017 Decision.

The Application includes an updated TIA by Kittelson (the "Kittelson Letter"), which found that the conclusions of the TIA remain correct and there have been no significant traffic increases in the Subdivision's vicinity since the 2017 Decision.

II. Procedural History

The City Council approved the 2017 Decision. The Appellants appealed the City Council's approval to LUBA, which denied their appeal and affirmed the City Council's approval. *Harra v. City of West Linn*, 77 Or LUBA 136 (2018). The Appellants did not appeal LUBA's decision.

The Applicant submitted the Extension Application on May 13, 2020. The Planning Commission held a public hearing on July 15, 2020 and approved the Application on August 19, 2020 by adopting Staff's recommendation for approval, which included the 18 conditions of approval from the 2017 Decision. The Applicant submitted a final written argument before the Planning Commission.

III. The Application satisfies all of the applicable criteria for a two-year extension of the 2017 Decision.

The approval criteria for the two-year extension are contained in CDC 99.325.A.1-3:

- "1. The applicant has demonstrated that the application is in conformance with applicable CDC provisions and relevant approval criteria enacted since the application was initially approved; and**
- 2. There are no demonstrated material misrepresentations, errors, omissions, or changes in facts that directly impact the project, including, but not limited to, existing conditions, traffic, street alignment and drainage; or**
- 3. The applicant has modified the approved plans to conform with current approval criteria and remedied any inconsistency with subsection (A)(2) of this section, in conformance with any applicable limits on modifications to approvals established by the CDC."**

The approval criteria do not require a demonstration of good cause, or need for the extension. The approval criteria contain three requirements. First, the criteria determine whether

¹ The Applicant refers to the 2016 TIA and 2017 Supplemental TIA as "the TIA."

any of the applicable CDC approval criteria have changed since the 2017 Decision. In this case, Staff confirmed that they have not. Second, the criteria determine if any of the relevant facts for the 2017 Decision have changed. In this case, they have not. Third, if the answers to the first two criteria are “yes,” this last criterion seeks to examine whether the approved Subdivision has been updated to address the changes of law or fact because the answers are “no,” the 2017 Decision need not be updated.

The Planning Commission found that CDC 99.325.A.1 and A.2 are satisfied. The Planning Commission correctly found that there has been no change to the CDC approval criteria since the 2017 Decision and that there has been no change in relevant facts that would suggest any of the CDC approval criteria are not met.

The Planning Commission based its decision on substantial evidence. In adopting the Staff recommendation, the Planning Commission found that “the Application continues to be in accordance with the applicable CDC provisions.” Consequently, CDC 99.325.A.3 is not relevant because, as explained above, there are no changes to the CDC approval criteria, or the facts which demonstrate that the CDC approval criteria are satisfied and, therefore, no requirement for the Subdivision to be altered.

IV. Appeal Issues

The arguments on appeal must be directed to the three approval criteria. Other considerations are irrelevant. As demonstrated by the Appellant’s appeal statement, the Appellants will argue that the conclusions in the prior TIA are not valid. The City Council must reject this argument.

The validity of the TIA is beyond the scope of this Application because both the City Council and LUBA expressly found that the TIA was correct. *Harra*, 77 Or LUBA 140–46. LUBA addressed and rejected assignments of error raised by Appellants related to the adequacy of public facilities, traffic counts, and assumed traffic growth rates. The adequacy of the TIA is an issue resolved by LUBA and may not be reconsidered by the City Council. *Gould v. Deschutes County*, 272 Or App 666, 685–87 (2015) (a ruling by LUBA binds an inferior body in any further proceedings and LUBA in any subsequent appeal).

V. Applicant’s Responses to Appellants’ Arguments

The Appellants submitted a brief appeal statement. Their arguments are conclusory and are not supported by substantial evidence. The City Council must reject the arguments for the reasons below.

A. The adequacy of available public facilities has been conclusively resolved and may not be reconsidered by the City.

The Appellants raise a general argument that adequate public facilities are not available to serve the Subdivision. The City Council must reject this argument for two reasons.

First, the 2017 Decision was subject to a complete review that includes a finding by the City Council that public facilities are adequate to serve the Subdivision. These facts have not changed.

Second, the record in this Application is clear that there have been no changes to the CDC approval criteria, relevant facts, or public facility requirements that require a change to the City Council's 2017 Decision.

Finally, other than oblique statements regarding traffic, the Appellants have offered no explanation of which public facilities are insufficient and what additional facilities should be required. The Appellants have not submitted their own TIA.

The City Council must reject the Appellants' argument for the above reasons.

B. The Applicant has satisfied CDC 99.325.A.1 and A.2.

The Appellants argue that "the applicant has not modified the approved plans to conform with A(1) or A(2)." The Appellants do not identify any CDC sections that these subsections relate to but the Applicant assumes that the Appellants are referring to the approval criteria for an extension. These approval criteria are addressed above and the City Council must reject the Appellants' argument for the reasons stated above.

C. The Applicant has not made any "material misrepresentations."

The Appellants argue that the Applicant has made "material misrepresentations" because it "attempted construction activity without approval" and because the TIA was not stamped by an engineer. The City Council must reject both arguments for the reasons below.

1. The Applicant's construction notice was not a material misrepresentation of fact of in the Application.

First, the Applicant made no attempt to "start construction without approval." The only construction-related activity that occurred was the issuance of a notice to the neighborhood, which stated, in relevant part, as follows:

"We *anticipate* starting construction on the Chene Blanc neighborhood 7/20/2020 contingent upon satisfying all city conditions and estimate completion in November 2020. The project days and hours of operation will be Monday thru Friday 7am-7pm. The project was approved with conditions of approval issued by the city of West Linn and all conditions of approval will be followed.

“We will be constructing all infrastructure and improvements identified on the construction plans and approved by the city of West Linn.” (Emphasis added.)

The above statement clearly provides that construction would only begin “contingent upon satisfying all city conditions” and that the Application does not constitute an attempt to begin construction without approval.

Regardless, the Applicant did not actually start or attempt to start construction and did not violate any provision of applicable law. Even if the Applicant had begun construction, it would not constitute a “material misrepresentation” in this Application and is irrelevant to the appeal criteria.

The Applicant’s attorney received an email from the City Attorney on the morning of July 20, 2020 asking if construction had begun. The Applicant’s attorney visited the site that day and confirmed that no construction had begun. The Applicant’s attorney sent an email to the City Attorney confirming this fact, accompanied by a photo showing that no construction had begun.

The City Council must reject this argument.

2. The Applicant’s TIA submitted with the Application is not a misrepresentation simply because it was not stamped by a transportation engineer.

The 2020 TIA explains that none of the traffic volumes in the surrounding area have significantly changed since the TIA. The Appellants identify no requirement that such a letter must be stamped by an engineer. Regardless, the letter was signed by Anthony Yi, P.E., a Senior Principle Engineer, and Matt Bell, a Senior Planner, both with Kittelson & Associates. There is no reason that the City Council should view the conclusions in the Kittelson Letter as unreliable. Further, LUBA rejected this same argument in its decision.

D. The Applicant’s traffic analysis is the best evidence of traffic impacts in the record and the growth rates assumed in the TIA are reasonable.

The Appellants make general arguments in the appeal statement that the applicant failed to account for the traffic generated by other approved projects. The City Council must reject this and any related arguments for several reasons.

First, legal and factual issues related to the growth rates assumed in the TIA have been conclusively resolved by the City Council and LUBA. The City Council adopted findings in this regard as follows:

“[T]he Council finds that [Kittelson] correctly accounted for trips from in-process developments and adjusted its counts to consider school year trips.

To account for trips from in-process developments and additional growth in regional and local traffic in the study area, [Kittelson] assumed a two percent (one percent per year for each of two years in its traffic counts.

*****[Kittelson] testified that this adjustment was sufficient to account for trips from in-process developments such as the new duplexes on Willamette Drive and the expansion of Mary's Woods.”**

LUBA examined the growth assumptions in the TIA in detail and concluded that “a reasonable person could rely on the TIA’s assumed growth rate to conclude that CDC 85.200 is satisfied.” *Harra*, 77 Or LUBA at 146.

Second, the City Council and LUBA’s resolution of the adequacy of the Applicant’s TIA may not be challenged in this proceeding because it was an issue conclusively resolved before LUBA and not appealed. *Gould*, 272 Or App at 685–87.

Finally, the TIA confirms that the projected trip generation has actually gone down and that surrounding traffic volumes have remained flat over the last several years. These conclusions are supported by actual trip data for Willamette Drive between 2016 and 2018. There is no evidence in the record prepared by a transportation engineer or planner which disputes this evidence.

The City Council must reject this argument.

E. There have been no material changes in facts.

The Applicant’s evidence and argument explain how the facts relied upon in the 2017 Decision have not changed.

1. There is no substantial evidence of a wetland that was not part of the 2016 wetland delineation.

The Appellants argue that a wetland was identified on the property after the Application was approved. This is incorrect. The original application included a wetland delineation, which received state concurrence. The Staff Report found as follows:

“There are two non-stream fed wetlands on the north portion of the site totaling 3,920 square feet. The City required a wetland delineation, which was prepared by Schott and Associates and is included in the Applicant’s submittal. The wetland delineation was confirmed by the Oregon Department of State Lands (DSL) in a concurrence letter which is part of the record.”

The Appellants offer no evidence of other wetlands on the site. The City Council must reject this argument.

2. There is no substantial evidence in the record that traffic has changed in the area so that it constitutes a “material” change in facts.

As explained above, the TIA explains that the trip generation assumptions from the TIA are still valid. The 2020 TIA also explains that traffic growth in the vicinity has been flat. There is no analysis in the record which disputes the TIA and the 2020 TIA and the Appellants have not submitted a contrary TIA. There is no evidence in the record that traffic in the vicinity has changed in any respect.

The City Council must reject this argument.

3. The Subdivision has not substantially changed.

Appellants argue that “the plan has changed.” This is not a basis for denial of the Application for two reasons.

First, a change in the Project plan is not precluded by the approval criteria. Second, the only change in the Project Plan is the widening of the street to provide for additional parking made at the request of the City. This was a change requested by the City Engineer, as explained in the Applicant’s June 10, 2020 letter to the Planning Commission and was not based on a change in the CDC. If the City Council does not approve of this change, the Applicant need not make the change. Appellants have offered no evidence or argument that the proposed additional parking violates the CDC in any way.

The City Council must this argument.

4. The pandemic is not a material change in facts relevant to the Application.

The Appellants have offered no support in fact or law that the COVID-19 pandemic constitutes a change in material facts that requires denial of the Application. While the pandemic has certainly changed everyone’s lives in recent months, it has not changed anything in the design of the Subdivision, availability of public utilities, physical site conditions, or surrounding development. The only material change that COVID-19 has arguably caused is a reduction in West Linn traffic as people have begun working at home.

The City Council must reject this argument.

VI. The City Council must dismiss the Appeal because the Appellants failed to comply with CDC 99.250.B by not including the required fee by the end of the Appeal period on September 8, 2020 and paying the Appeal fee after the end of the time period to file a complete Appeal.

The Appeal period under CDC 99.250.A for this Application ended on September 8, 2020 (the first business day following September 7, 2020, a legal holiday, as provided for in

CDC 99.230.A). The Appellants filed their Appeal on September 8, 2020 without the required fee. The Appellants paid the required fee one day later on September 9, 2020 and after the end of the Appeal period (**Exhibit 1**).

The City Council must dismiss the Appeal because the fee was not paid within the time to file all the required elements of the Appeal, including the fee. CDC 99.230.A requires the Appeal, including the required fee, to be filed by the fourteenth day from the date of the mailing of the notice of the Planning Commission Decision. CDC 99.250.B provides that the Appeal application “*shall* be accompanied by the required fee (emphasis added). “Shall” is mandatory. CDC 2.010.A.

The CDC mandates that an appeal be complete by the end of the appeal period, including the required fee. The Appellants’ failure to comply with the mandatory requirement for filing an Appeal means that their Appeal does not comply with the CDC’s requirements. The proper remedy in this case is to dismiss the Appeal, which will result in the Planning Commission’s Decision becoming having become final on September 8, 2020.

The Appellants’ failure to follow the CDC’s mandatory requirements prejudices the Applicant’s substantial rights to a full and fair hearing and the opportunity to make its case. The Applicant is entitled to a procedure where mandatory CDC requirements are followed so that it is not subjected to an unnecessary hearing, additional process and delay.

The Appellants had fourteen days to pay the required fee and their delay in doing so does not excuse their failure to meet a mandatory requirement. The CDC contains no exceptions to this requirement.

The Applicant respectfully requests that the City Council dismiss the Appeal and take no further action the Appeal.

VII. Final Written Argument.

The Applicant has not waived final written argument after the record is closed to all other parties under ORS 197.763(5)(e).

VIII. Conclusion.

For the above reasons and the Applicant’s oral testimony, the City Council must deny the Appeal and approve the two-year Extension Application. The extension Application and the relevant approval criteria are not an opportunity to re-evaluate the 2017 Decision where no material facts or law have changed. The issues resolved by LUBA against the Appellants may not be re-argued in this Appeal. Finally, the Staff has recommended approval and the Planning Commission has approved the Extension Application because the Applicant has submitted substantial evidence and has addressed the approval criteria. The Appellants, on the other hand, rely on 2017 evidence rejected by the City Council and LUBA.

Mr. Russ B. Axelrod, Mayor
October 2, 2020
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Very truly yours,



Michael C. Robinson

MCR/jmhi
Enclosure

cc: Mr. Tim Ralston (*via email*) (*w/enclosure*)
Mr. Lucas Ralston (*via email*) (*w/enclosure*)
Mr. Steve Miller (*via email*) (*w/enclosure*)
Mr. Eric Evans P.E. (*via email*) (*w/enclosure*)
Mr. Garrett Stephenson (*via email*) (*w/enclosure*)
Ms. Jennifer Arnold (*via email*) (*w/enclosure*)
Mr. Tim Ramis (*via email*) (*w/enclosure*)

PDX\134673\248389\MCR\28962354.1

EXHIBIT LIST

Exhibit 1 September 14, 2020 email between Jennifer Arnold and Michael C. Robinson showing required appeal fee paid on September 9, 2020.

From: [Arnold, Jennifer](#)
To: [Robinson, Michael C.](#)
Cc: [Steve Miller](#)
Subject: RE: Chene Blanc Appeal
Date: Monday, September 14, 2020 8:42:19 AM

The invoice is stamped 'paid in full 9/9/20'.

From: Robinson, Michael C. [<mailto:MRobinson@SCHWABE.com>]
Sent: Monday, September 14, 2020 8:41 AM
To: Arnold, Jennifer <jarnold@westlinnoregon.gov>
Cc: Steve Miller <stevem@emeriodesign.com>; Robinson, Michael C. <MRobinson@SCHWABE.com>
Subject: RE: Chene Blanc Appeal

Thanks, Jennifer. Sorry to be a pain but was payment first made on 9/9? That's what it sounds like.

[Michael C. Robinson](#)

Shareholder

Direct: 503-796-3756

Mobile: 503-407-2578

mrobinson@schwabe.com

[Schwabe Williamson & Wyatt](#)

[Please visit our COVID-19 Resource page](#)



From: Arnold, Jennifer <jarnold@westlinnoregon.gov>
Sent: Monday, September 14, 2020 8:39 AM
To: Robinson, Michael C. <MRobinson@SCHWABE.com>
Cc: Steve Miller <stevem@emeriodesign.com>
Subject: RE: Chene Blanc Appeal

Mike,

Due to power outages caused by the fires we were unable to process payment until the next day. I have attached the paid invoice per your request and it should answer most of your questions.

Jennifer

From: Robinson, Michael C. [<mailto:MRobinson@SCHWABE.com>]
Sent: Monday, September 14, 2020 8:27 AM
To: Arnold, Jennifer <jarnold@westlinnoregon.gov>
Cc: Steve Miller <stevem@emeriodesign.com>; Robinson, Michael C. <MRobinson@SCHWABE.com>